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THE BERRY AMENDMENT: A COMPREHENSIVE LOOK AT THE HISTORY AND IMPLICATIONS FOR PROGRAM MANAGERS OF HAND- AND MEASURING-TOOL-INTENSIVE PROGRAMS

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September 2014

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AND IMPLICATIONS FOR PROGRAM MANAGERS OF HAND- AND
MEASURING-TOOL-INTENSIVE PROGRAMS**

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ABSTRACT

The scope of this project is to examine the technical, financial, scheduling and implementation aspects for Program Managers who manage hand- and measuring-tool-intensive programs. Initially, the history, definition, interpretation and intent of the Berry Amendment will be examined to establish a basis for recommendations. The discussion will transition into cost, schedule and budget implications for tool-intensive programs to include how other military services deal with the Berry Amendment restrictions. Finally, specific recommendations will be provided that address practical methods to deal with Berry Amendment restrictions. As a result of this project, the Army will better understand how to meet customer requirements while still executing within the spirit and intent of the Berry Amendment.

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LIST OF ACRONYMS AND ABBREVIATIONS

AAO	Army Acquisition Objective
BAA	Buy American Act
BOIP	Basis of Issue Plan
COTS	commercial off-the-shelf
CS&CSS	Combat Support and Combat Service Support
DFARS	Defense Federal Acquisition Regulation Supplement
DHS	Department of Homeland Security
DLA	Defense Logistics Agency
DNAD	Domestic Non-availability Determination
DOD	Department of Defense
FAR	Federal Acquisition Regulation
FSC	Federal Supply Classification
FY	fiscal year
GAO	Government Accountability Office
GSA	General Services Administration
H.R.	House of Representatives
PdM	Product Manager
PEO	Program Executive Office
PGI	Procedures, Guidance and Information
PMO	Program Management Office
PM AGSE	Product Manager Aviation Ground Support Equipment
PM TMDE	Product Manager Test Measurement Diagnostic Equipment
Pub L.	Public Law
RFI	Request for Information
SAT	Simplified Acquisition Threshold
SKOT	Sets, Kits, Outfits and Tools
U.S.C.	United States Code

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I. INTRODUCTION

A. BACKGROUND

The Assistant Secretary of the Army for Acquisition, Logistics and Technology through the Program Executive Office (PEO) Combat Support and Combat Service Support (CS&CSS) and Project Manager, Force Projection to Product Manager (PdM), Sets, Kits, Outfits and Tools (SKOT) manages Supply Class II (expendables) and Class IX (Repair Parts) to include issue of new items, warranty service and replacement of lost, damaged or destroyed SKOT, many of which include hand and measuring tools. This responsibility has been formalized and documented in the Army Acquisition Executive and PEO CS&CSS's management charter where life cycle management of assigned programs and management of all programmatic life cycle aspects within cost, performance and schedule baselines ensuring delivery of fully supportable and effective systems are delegated to PdM SKOT (Shyu & Fahey, n.d.). PM SKOT's primary responsibility is ensuring soldiers have industrial quality hand and measuring tools required to perform their mission.

Two categories of SKOTs PdM SKOT manages are soldier portable maintenance kits and shelter/vehicular/trailer mounted maintenance systems. Soldier portable maintenance kits are tool assemblages integrated into storage cases that can be readily transported by soldiers without the aid of material handling equipment. These systems are very similar to standard commercial tool boxes. Shelter/vehicular/trailer mounted maintenance systems are tool assemblages mounted within a shelter, vehicle or on trailer platform. PdM SKOT develops tests and procures these systems to meet the total Army requirement as defined by the Army Acquisition Objective (AAO) documented in the Basis of Issue Plan (BOIP). The BOIP is a requirements document developed by the material and capability developer and approved by the Department of the Army. BOIPs are developed for new equipment and describe in detail the item, its capabilities, component items of equipment, where the item is to be used and the associated items of equipment and personnel (Department of the Army, 2013). The BOIP is critical to the material developer because it identifies the total number of systems required for a

particular piece of equipment. PdM SKOT also manages systems fielded to replace outdated systems that are cascaded downward until the AAO is met. Once systems are fielded, both Field Level and Sustainment Level RESET programs are established to maintain the configuration and required quantities.

The Department of the Army further clarified PdM SKOT's role by directing that "local commanders, prior to procuring SKOT, will contact PdM SKOT with their SKOT requirement to determine if PdM SKOT can supply the SKOT item to meet user requirements. PdM SKOT also manages development, production and sustainment of several Soldier Portable and Shelter/Vehicle mounted maintenance systems that include hand and measuring tools. Commanders, grade O-6 or higher must approve local purchase for their brigade/brigade equivalent and only if using PdM SKOT negatively impacts readiness, through long lead time for replacement or the SKOT is not available through PdM SKOT" (Department of the Army, 2008).

B. PROBLEM IDENTIFICATION

PdM SKOT has been tasked by the Army to develop, test, procure and manage SKOT. A large number of these sets and kits contain hand and measuring tools. Due to the high level of technological maturity, availability of the required tools in the commercial marketplace and clear understanding of end-state requirements; PdM SKOT normally uses a single step development to acquire the required capability. The majority of PdM SKOT maintenance system procurement strategies rely on acquiring commercial off-the-shelf (COTS) tool loads for sets and kits and integrating those tool loads into a shelter or container. This method is effective because normally there are several commercial producers who can meet the requirements. The performance risk for this method is low because the usage of COTS materials ensures system performance will be in line with commercially acceptable levels, which the user has agreed to accept. The use of COTS materials also ensures a strong and well-established technical base is available to support the equipment in future years. The primary issue with using primarily COTS equipment is we have yet to determine a practical and timely solution for overcoming Berry Amendment restrictions. United States Code 2533a (Berry Amendment), among

several things, specifically mandates that hand or measuring tools for defense procurement must be produced in the United States. This restriction has caused long and unacceptable delays in the contracting process or procuring of systems that do not totally meet the system requirements provided by the combat developer.

From a government acquisition employees perspective violation of the Berry Amendment restrictions could result in an Anti-Deficiency violation with penalties ranging from written admonishment or reprimand to removal from office. In some cases the party responsible for the violation might be held personally liable for the contract amount. Additionally, a knowing or willful violation may result in criminal prosecution, fine and up to two years in prison. For contractors that knew or should have known of the Berry Amendment violation the contract is a nullity. When a contract is a nullity, it is void and therefore unenforceable (Bamford, 2003).

C. DATA AND ANALYSIS

Information will be collected on the history and reasons for the Berry Amendment as well as constraints, restrictions and exceptions provided by the Berry Amendment. Additionally, data will be collected on acquisition processes from contracting offices, select service Program Management Offices (PMOs) and other government agencies that manage hand and measuring tool intensive programs. Processes, reports, historical documents and acquisition information will be analyzed to determine contract and acquisition strategies as well as best practices that comply with the Berry Amendment while still delivering the required capability.

D. PROJECT ORGANIZATION

The project will begin by examining the history of the Berry Amendment to include the congressional history and comparisons to the Buy American Act (BAA). The project will then examine the constraints and impacts of the Berry Amendment on tool intensive programs. Finally, the project will examine how program managers can mitigate cost, schedule and performance impacts of the Berry Amendment in tool intensive programs.

E. GOAL

The goal of this project is to conduct an analysis sufficient to provide the history and restrictions of the Berry Amendment and determine practical methods for program managers to deal with Berry Amendment restrictions in tool intensive systems. Additionally, evidence collected will attempt to provide a an understandable definition of the Berry Amendment restrictions on hand and measuring tools along with cost, schedule and budget implications for tool intensive programs.

II. THE BERRY AMENDMENT

A. OVERVIEW

The United States Constitution provides Congress broad authority to place conditions on the purchases made by the federal government or with federal dollars (Luckey, 2012). Included in these conditions has been a documented and long standing preference for domestic products. The preference for domestic products has been codified in the Buy American Act and what became known as the Berry Amendment. This chapter will discuss the history of the Berry Amendment, why the Berry Amendment is still relevant and the differences between the BAA and the Berry Amendment.

B. CONGRESSIONAL HISTORY

Berry Amendment restrictions have been in place since just prior to World War II. The earliest version of what became known as the Berry Amendment was included in the 1940 Naval Appropriations Act that restricted purchase of food by the Navy not grown or produced in the United States (Grasso, 2014).

Domestic restrictions on procurement were included in the 1941 Defense Appropriations Act to promote the purchase of certain United States goods by the Department of Defense (DOD). Annual defense appropriations thereafter until 1993 restricted use of appropriated funds for procurement of certain commodities to domestic sources (Grasso, 2014). Prior to World War II Congress understood war was on the horizon and the original intent of the restrictions were to ensure U.S. troops wore military uniforms produced in the United States and were fed food products solely produced in the United States. Domestic restrictions were first enacted into law on April 5, 1941, as part of the FY1941 Fifth Supplemental National Defense Appropriations Act P.L. 77-29 (Grasso, 2014). This amendment eliminated exceptions to the Buy American Act of 1933 for products procured by the DOD (Grasso, 2014).

Additional items have been added over time with the purpose seeming to be to maintain and support the U.S. defense industrial base for those particular items covered by the Berry Amendment. Additionally, the domestic restrictions help protect the DOD

from being held hostage by foreign suppliers in times of conflict. Additional items have been added over time and the subsequent paragraphs will examine some of those key additions and look at how the Berry Amendment has evolved.

The Berry Amendment was named for Ellis Yarnel Berry, a congressman from South Dakota's western district from 1951–1971 (Biographical Directory of the United States Congress, n.d.). In 1952 Congressman Berry introduced an amendment to the DOD's Buy American restrictions. Prior to Congressman Berry's amendment only food and certain clothing products were covered in the restrictions. Berry's amendment expanded the DOD's Buy American restrictions to cover all clothing, cotton and wool. The final wording of the Amendment prohibited use of appropriated funds to procure any article of food, clothing, cotton or wool whether in the form of fabric or yarn or contained in fabric, materials or manufactured articles) not grown, reprocessed, reused or produced in the United States unless sufficient quantities could not be acquired as needed in the United States (Bamford, 2003). Subsequent clarifications have included not only appropriated funds but and funding made available to the DOD. From this point forward domestic restrictions in the yearly Defense Appropriation Acts became known as Berry Amendments. The Berry Amendment was included in every subsequent defense appropriations act until 1992 when it became a note to United States Code (U.S.C.) 2241. The Berry Amendment was made permanent in 1994 by section 8005 of Public Law (Pub. L.) 103–139. The Berry Amendment is implemented through the Defense Federal Acquisition Regulation Supplement (DFARS) (Department of Defense, 1998).

In the 73 years since the original Amendment Berry restrictions and provisions have greatly expanded. We will discuss some of the key provisions below.

C. KEY CHANGES TO THE BERRY AMENDMENT

This section will review how the Berry Amendment has evolved over time. Table 1 includes key changes to the Berry Amendment.

Table 1. Key Changes to the Berry Amendment

YEAR	CHANGES
2001	Codified into law. Secretary of Defense must notify Congress before a waiver is granted. Domestic preference for food, textiles and hand and measuring tools.
2005	Applies to all funds made available to DOD, (not just appropriated funds). Applies to sub contractors.
2007	Specialty metals removed.
2009	Exception for contingency operations added. Berry like restrictions imposed on the Department of Homeland Security.
2011	Non-availability exception added for hand and measuring tools.

On April 3, 2001, Representative Walter Jones from North Carolina introduced House of Representatives (H.R.) Bill 1352, the purpose of which was to codify and modify the provisions of the Berry Amendment. At the introduction of the bill, Representative Jones stated that the Army black beret¹ controversy and the decision of the Defense Logistics Agency to waive the Berry Amendment provisions and allow the procurement of berets from foreign sources highlighted the need to review the current law and look for ways to improve the effectiveness of the law. H.R. 1352 also added a requirement that the Secretary of Defense notify the House and Senate committees on

¹ In October 2000 the Army announced that the black beret would become the standard headgear for the U.S. Army. To meet the requirement for 4.7 million berets, contracts were awarded to one domestic (using materials from foreign sources) and several foreign firms, including firms from the People's Republic of China, Sri Lanka, and Romania. The Defense Logistics Agency issued two Berry Amendment waivers to meet the Army's needs. The waivers for the black berets resulted in protests from domestic manufacturing segments, military and veterans' groups, members of Congress, and the public.

Appropriations, Armed Services, and Small Business before a waiver is made. The provisions of H.R. 1352 were enacted into law as part of the fiscal year (FY) 2002 National Defense Authorization Act, Pub. L. 107–107 and codified at 10 U.S.C. 2533a. The Berry Amendment, 41 U.S.C. 2533a required the DOD to give preference to domestically grown, reprocessed, reused, or produced items related to food, textiles (clothing, threads, fabrics) and hand or measuring tools on procurements over the Simplified Acquisition Threshold (SAT). The SAT threshold is currently set at \$150,000.

The FY2002 Defense Authorization Act, in addition to turning the Berry Amendment into a permanent part of U.S.C. added hand and measuring tools to the domestic restrictions already in place for foods and textiles. The FY2002 Defense Authorization Act also gave the Secretary of Defense authority under certain conditions to waive the requirement to buy restricted items domestically.

In 2005 the Office of the Under Secretary of for Defense for Acquisition, Technology and Logistics issued clarifying policy for the Berry Amendment that stated, “Unless a specific exception in law applies, the products, components, or materials listed below must be grown, reprocessed, reused, or produced wholly in the United States if they are purchased with funds made available (not necessarily appropriated) to DOD. These rules apply to both prime contractors and subcontractors. The items listed are food, clothing, tents, tarpaulins, covers, natural fibers or yarns, natural fiber products, natural fabrics, synthetic fabrics, fabric blends, individual equipment (covered in Federal Supply Class 8465) made from or containing fibers, yarns, fabrics, or materials (including all fibers, yarns, fabrics, or materials therein), specialty metals (as defined in DFARS 252.225.7014), stainless steel flatware, hand tools, and measuring tools (Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, 2005). This policy clarified and reinforced that defense acquisitions must comply with Berry Amendment provisions.

In 2007 specialty metals were removed from the Berry Amendment because Section 842 of the John Warner National Defense Authorization Act for FY2007 (Pub. L. 109–364), entitled “Protection of Strategic Materials Critical to National Security” was

made a separate provision from the Berry Amendment and it established new provisions specific to specialty metals, codified as 10 U.S.C. 2533b.

In 2009, Section 826 of the National Defense Authorization Act for FY2009 amended the Berry Amendment by making exceptions for the procurement of covered items for the purpose of contingency operations, when the procurement is under circumstances described as of an unusual and compelling urgency. Such emergency operations might include military action taken against U.S. adversaries, military action in response to an attack with weapons of mass destruction, or military action resulting from national emergencies declared by the President.

In 2009 Berry type restrictions were also imposed on the Department of Homeland Security (DHS). The American Recovery and Reinvestment Act (H.R. 1), passed by both houses of congress on February 13, 2009, included legislation offered by Congressman Larry Kissell (D-NC) mandating that any textile and apparel products contracted by the U.S. DHS be manufactured in the United States with 100 percent U.S. inputs. The “Kissell Amendment” was modeled on and picks up, with little or no modification, many of the specific provisions of the Berry Amendment (Grasso, 2014). This is relevant because it shows that Congress was not interested in easing restrictions imposed by the Berry Amendment but was applying the restrictions to other agencies.

New legislation provisions contained in Pub. L. 111–83, the FY2011 Defense Authorization Act (H.R. 6523) provided a non-availability exception for the procurement of domestic hand or measuring tools. On March 17, 2011, DOD issued an interim rule in accordance with Section 847. The interim rule was published in the Federal Register and the public comment period was extended through May 16, 2011. The rule stated that purchase of hand and measuring tools from foreign sources is allowed only when such tools are not available from domestic sources. If no domestic sources produce the tools, then allowing purchase from a foreign source will not impact any U.S. small business (Department of Defense, 2011). In accordance with Executive Order 13563, Improving Regulation and Regulatory Review, dated January 18, 2011, the DOD determined this rule is not excessively burdensome to the public and is consistent with DOD’s

requirement to acquire domestic hand or measuring tools unless an authorized exception applies.

The Berry Amendment has been in existence in one form or another for 73 years. There is no indication or historical precedence or indications that restrictions will be lifted or the strict requirements imposed when attempting to use a foreign source will be eased or lifted.

D. WHY BERRY?

The Berry Amendment has been around in some form since the beginning of World War II. Over the years, the amendment has consistently required the Department of Defense, when it purchased listed items, to buy items that are 100% domestic in origin. The list has varied over the years, but generally has included products made of textiles or specialty metals. The current version of the amendment is found in Sections 2533a and 2533b of Title 10 of the United States Code. Section 2533b contains the rules governing specialty metals. Section 2533a governs all other listed products.

Under Section 2533a, the Department of Defense may not use appropriated or otherwise available funds to purchase certain items if they are not grown, reprocessed, reused, or produced in the United States. The covered items include food; clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof); tents (and the structural components thereof), tarpaulins, or covers; cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials; or hand or measuring tools. These provisions do not apply if the Secretary of Defense or the Secretary of the relevant military department determines that the items are not available in satisfactory quality, sufficient quantity, or as and when needed at a market price. Procurements made outside the United States in support of combat operations or

contingency operations, procurements where competitive procedures do not have to be used because of unusual and compelling urgency of need, and purchases under \$3,000 are not subject to these requirements. Items purchased for resale purposes in commissaries, exchanges, or non-appropriated fund instrumentalities operated by the Department of Defense are also exempt. Each provision contains its own limited trade agreements exception. Such emergency operations might include military action taken against U.S. adversaries, military action in response to an attack with weapons of mass destruction, or military action resulting from national emergencies declared by the President. In addition to the common exemptions, Section 2533a exempts procurements by a vessel in foreign waters and “emergency procurements or procurements of perishable foods by, or for, an establishment located outside the United States for the personnel attached to such establishment.” This provision applies to contracts and subcontracts for the procurement of commercial items, including off-the-shelf items.

The Berry Amendment Restrictions listed above help ensure that there will be a functioning industrial base for the goods restricted to DOD domestic purchase. This is critical in times of conflicts because it ensures certain goods are readily available. It also ensures for items with primarily military application that they will be domestically available and not dependent on foreign sources.

Economic, social, and political factors come into play when examining the purpose and intent of the Berry Amendment. If the U.S. becomes dependent on purchasing equipment and supplies from foreign sources, what prevents an adversary from cutting off U.S. access to such items or refusing to build militarily critical items in times of crisis or conflict? Another argument for maintaining the Berry Amendment restrictions is that they often benefit small, minority-owned, and disadvantaged businesses that may depend on DOD for their viability. According to congressional testimony, U.S. textile and apparel industries combined have lost approximately 540,000 jobs during the 1990s (Grasso, 2014).

Case law and several Government Accountability Office (GAO) reports indicate that historically the Berry Amendment has been strictly interpreted with few exceptions granted (Bamford, 2003). Several court rulings have upheld the strict interpretations of the

Berry Amendment. Generally if an item is covered then it must be produced entirely in the United States. Government Accounting Office reports in 1987 and 2005 showed DOD entities did not understand or comply with Berry Amendment. The congressional response to these reports indicated that Congress has no interest in easing the waiver process or reducing the type of items covered by the Berry Amendment.

DOD officials have expressed contrasting views about the necessity for the Berry Amendment. Former Vice President and Secretary of Defense Richard Cheney issued a 1989 report to Congress called “The Impact of Buy American Restrictions Affecting Defense Procurement.” The report suggested that an alternative to the Berry Amendment would be a specifically targeted approach to provide DOD with the ability to establish assured sources of supply for mobilization purposes through existing mobilization base planning under the Defense Production Act. The report concluded that “statutory and regulatory policies and other federal and DOD acquisition regulations like the Berry Amendment, which prohibit or impede foreign-source participation in U.S. defense contracting, constitute a considerable departure from the concept of full and open competition.” In 1997, the DOD Acquisition Reform Executive Focus Group’s final report called for the elimination of some Berry Amendment restrictions on food, clothing, and textiles, while retaining restrictions on specialty metals and measuring tools (Grasso, 2005).

Some (i.e., some domestic and foreign companies) have criticized the Berry Amendment, stating that it undercuts free market competition, may promote discriminatory practices, robs businesses of incentives to modernize, causes inefficiency in some industries due to a lack of competition, and results in higher costs to the DOD, because the military services pay more for “protected” products than the market requires. Some critics of the Berry Amendment also argue that the U.S. will lose its technological edge in the absence of competition and alienate foreign trading partners, thereby provoking retaliations and loss of foreign sales. They assert that the Berry Amendment will ultimately reduce the ability of the U.S. to negotiate and persuade its allies to sell or not sell to developing countries. They contend that the Berry Amendment promotes U.S. trade policies that undermine the international trade agreements. Furthermore, restrictions

on food mean that in most cases it is illegal for DOD to purchase an item or food if it is a foreign item or if it has any foreign ingredient or processing. On the other hand, critics have also expressed concern over the increased levels of imported, ready to wear goods, and the prevalent “sweat shop labor used to produce those items” (Grasso, 2014).

Government Accounting Office reports in 1987, 2001 and 2005 showing DOD entities did not understand or comply with Berry Amendment (General Accounting Office, 1987; General Accounting Office, 2001; Government Accountability Office, 2005). The congressional response to these reports indicated that Congress has no interest in easing the waiver process or reducing the type of items covered by the Berry Amendment. In April 2014 after being pressured by Congress the DOD issued a memo that will help ensure Berry Amendment restrictions are being followed and new recruits use their one time voucher to buy shoes for physical training be made in the United States (“Levin welcomes DOD decision on made-in-America footwear,” 2014).

Acquisition professionals must understand the Berry Amendment because it is here to stay. Over the years there have been attempts to reduce the scope of the Berry Amendment but over time the Berry Amendment has been strengthened and very much remains in effect.

E. DIFFERENCES BETWEEN THE BERRY AMENDMENT AND THE BUY AMERICAN ACT

One of many conditions Congress has placed on direct government purchases is a requirement they be produced in the United States. The most well known of these conditions is the Buy American Act. The BAA is the major domestic preference statute governing procurement by the federal government. The BAA passed during the great depression (1933) with the intent to save and create domestic jobs. It does not limit competition but gives a preference to U.S. manufactured goods by adding a price evaluation factor to foreign end products.

The Berry Amendment and the Buy American Act are often confused and used interchangeably with each other but they are two separate laws implemented by two different regulations. They differ with regard to their scope, threshold, exceptions, and

waiver authority. For DOD purchases both amendments apply but being BAA compliant does not mean that you are in compliance with the Berry Amendment.

The BAA applies to direct purchases by the federal government of more than \$3,000, providing their purchase is consistent with the public interest, the items are reasonable in cost, and they are for use in the United States. The act requires that “substantially all” of the acquisition be attributable to American-made components. Regulations have interpreted this requirement to mean that at least 50% of the cost must be attributable to American content. While the act has only been substantively amended four times since its enactment in 1933, every Congress in the intervening years has seen fit to enact some form of additional domestic preference legislation (Luckey, 2012).

The second most common category of restrictions affect certain direct purchases of the federal government (i.e., ones that are governed by the Buy American Act), for which Congress has decided a greater percentage of American content should be required, as opposed to the standard 50%. The Berry Amendment is the one we are concerned about, is probably the most recognized legislation in this category. The Berry Amendment is a “super percentage” statute which limits the Department of Defense when purchasing certain goods to such goods that are 100% American in origin. Over the years, Congress has enacted “Little Buy American Acts” to restrict procurements that do not fall under the application of the Buy American Act or to adjust the percentage content standard. The Buy America Act, which attaches a domestic content requirement to purchases made with federal transportation funds, is illustrative of provisions that govern purchases not made directly by a federal entity, but which use federal funds. The majority of the Little Buy American Acts are this type of legislation. Unless the provisions specifically reference the definitions of the Buy American Act, they generally require the purchase of 100% American made products (Luckey, 2012).

The Berry Amendment is a “super percentage” statute which requires that certain purchases of the DOD be 100% American in origin. The Berry Amendment is an example of a provision where Congress has decided that a greater percentage of American content should be required in acquisitions that are subject to the primary Buy American Act.

The two major differences between the BAA and the Berry Amendment are: (1) the BAA applies only to federal government contracts to be carried out within the U.S., while the Berry Amendment, which is for DOD contracts only, is not limited to contracts within the U.S. and (2) the BAA requires that “substantially all” of the costs of foreign components not exceed 50% of the cost of all components (thus, an item can be of 51% domestic content and still be in compliance with the BAA) while the Berry Amendment requires that items be 100% domestic in origin.

Other difference between the Buy American Act and the Berry Amendment will be discussed below. The Berry Amendment is applicable to purchases over the simplified acquisition threshold using funds appropriated or otherwise made available to DOD, and applies even if another agency, such as the General Services Administration (GSA), is purchasing the item for DOD. Unless an exception under the Berry Amendment is found to apply, it requires that all covered items must be grown, reprocessed, reused, or produced in the United States, regardless of whether they are purchased as end items, components, or materials. With few exceptions, the BAA applies to all supply purchases of supplies or construction materials over the micro purchase threshold for use in the U.S. It also requires the use of domestic construction material. The BAA requires application of a differential factor to the evaluated cost or price of supplies or construction materials that are not domestic end products. A two-part test is used to define a domestic end product: (1) the end product must be manufactured in the U.S. and (2) the cost of all its domestically manufactured components must exceed 50% of the cost of all its components. The BAA is applicable to the entire Federal Government. The BAA does not preclude foreign firms from competing for Federal contracts for supplies or construction materials. However, the Act does require that an evaluation factor be placed on proposals offering foreign end items. For civilian agencies, this evaluation factor for supply contracts is 6% if the lowest domestic offeror is from a large business, or 12% if the lowest domestic offeror is from a small business. For the Department of Defense, the evaluation factor is 50%. The evaluation factor for construction material contracts is 6% for all agencies (VanLeeuwen, 2009).

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III. BERRY AMENDMENT CONSTRAINTS

A. OVERVIEW

This chapter will identify statutory and regulatory constraints and restrictions imposed by the Berry Amendment on hand and measuring tool intensive programs. This chapter will also identify exceptions that are available to program managers. A clear understanding of exactly what the Berry Amendment restrictions and exceptions are will help program managers develop procurement strategies that allow them to field the required capability while complying with the letter, spirit and intent of the Berry Amendment. This chapter will also define which items are considered hand and measuring tools and fall under Berry Amendment restrictions. This information will help the program manager understand if the Berry Amendment applies to their particular acquisition. Finally, Berry Amendment impacts to hand and measuring tool intensive programs in the Army, Marine Corps and General Services Administration will be examined.

B. BERRY AMENDMENT CONSTRAINTS AND RESTRICTIONS

10 U.S.C. § 2533a states that except as provided in subsections (c) and (b) funds appropriated or otherwise available to the Department of Defense (DOD) may not be used for the procurement of an item described in subsection (b) if the item is not grown, reprocessed, reused, or produced in the United States. Hand and measuring tools are specifically called out in subsection (b). Most hand and measuring tools purchased by the DOD are commercial off the shelf items and 10 U.S.C. also explicitly states that the restriction applies to contracts and subcontracts for commercial items (Berry Amendment, 2002). 10 U.S.C. clearly imposes a restriction on hand and measuring tools purchased from non-domestic sources but does not provide any guidance or instructions on how those restrictions should be implemented.

Specific Berry Amendment restrictions are included in the Department of Defense Federal Acquisition Regulation Supplement and to a much lesser extent in the Federal Acquisition Regulation (FAR). The DFARS contains laws, policies and procedures that

apply to purchases and contracts made by DOD contracting activities. The FAR codifies and publishes uniform policies and procedures for acquisition by all federal executive agencies.

1. DFARS

The Berry Amendment is implemented through the DFARS at subpart 225.7002-1. Subpart 225.7002-1 requires hand and measuring tools listed in Federal Supply Classification (FSC) codes 51 and 52 to be produced in the United States to include the possessions of the United States. The DFARS is supplemented by Procedures, Guidance and Information (PGI) 225 of which section 225.7002-1(b) defines produced in the United States to mean that the hand and measuring tool was assembled in the United States out of components, or otherwise made from raw materials into the finished product that is to be provided to the government (Department of Defense, 2004). Hand and measuring tools that are assembled in a country other than the United States, then disassembled and reassembled in the United States are not considered produced in the United States (Department of Defense, 2014a). The restriction applies to foreign military sales transactions and anytime DOD is buying on behalf of another agency. Likewise, purchases on behalf of the DOD are subject to the restriction. In other words, the restrictions apply even if the DOD funded purchase is not on a DOD contract. The source of funding is the determining factor in determining if the Berry Amendment applies. The restriction also applies to all tiers of suppliers with the prime contractor responsible for verifying the source of sub-components. This distinction is critical to hand and measuring tool kit and set acquisition because many of the tool kits providers are assemblers who take tools from various sources and integrate them into a single kit.

The requirement to buy hand and measuring tools produced in the United States does not impose any restrictions on the source of the components of the hand and measuring tools. This is unlike the Berry Amendment restriction on clothing, which explicitly requires domestic sources for the materials and components of clothing as well as restrictions on various types of fibers, and fabrics that might be in the components of the clothing (Department of Defense, 2014b).

If the acquisition of the hand or measuring tools is also subject to the Buy American statute, then in order to qualify as a domestic end product, the cost of the components mined, produced or manufactured in the United States or a qualifying country must exceed 50 percent of the cost of all the components of the hand and or measuring tool (Department of Defense [DOD], 2014c).

2. FAR

The FAR does not generally apply since the Berry amendment only applies to DOD acquisitions. FAR 25.104(a) has a list of Buy American Act exceptions and FAR 6.302-2 defines unusual and compelling urgency as it relates to the Berry Amendment. Unusual and Compelling Urgency is defined as “when the agency’s need for the supplies or services is of such a compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals, full and open competition need not be provided for. Specifically, a delay in award of a contract would result in serious injury financial or other to the Government (General Services Administration, Department of Defense, & National Aeronautics and Space Administration, 2005).

3. Buy American Statute

If the acquisition of the hand or measuring tools is also subject to the Buy American statute, then in order to qualify as a domestic end product, the cost of the components mined, produced or manufactured in the United States or a qualifying country must exceed 50 percent of the cost of all the components of the hand and or measuring tool (DOD, 2014c).

C. EXCEPTIONS TO THE BERRY AMENDMENT

Exceptions to the Berry Amendment allow program managers to purchase hand and measuring tools from non-domestic sources. The exceptions are very narrow and do not provide a lot of flexibility to purchase hand and measuring tools non-domestically. There are a number of DFARS Exceptions to the Berry Amendment that could apply to hand and measuring tools and they are listed below.

1. DFARS 225.7002-2(a). Acquisitions at or below the simplified acquisition threshold of \$150,000. Acquisitions must be a onetime buy and cannot be split solely for the purpose of remaining under the simplified acquisition threshold.
2. DFARS 225.7002-2 (b) lists as an exception, acquisitions which cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at United States market prices. Under this exception service secretaries and the director of the Defense Logistics Agency are authorized to make a Domestic Non-availability Determination (DNAD). The DNAD approval cannot be delegated to a lower level.
3. DFAR 225.7002-2 (c). Acquisitions of items listed in FAR 25.104(a), unless the items are hand and measuring tools.
4. DFAR 225.7002-2 (c) include acquisitions outside the United States in support of combat operations. The Office of the Secretary of Defense will determine when the combat operations clause applies.
5. DFAR 225.7002-2 (f) Acquisitions in support of contingency operations or in conjunction with a Justification and Approval of other than competitive procedures on the basis of unusual and compelling urgency in accordance with FAR 6.302-2.

D. DEFINITION OF HAND AND MEASURING TOOLS

Understanding if a particular item is defined as a hand and measuring tool will help determine if the Berry Amendment applies to an acquisition. DOD Directive 4130.2 *Federal Supply Code Groups and Classes* provides FSC codes that have been adopted by the DOD for all items of personal property (Department of Defense, 2003). FSC code 51 defines hand tools and FSC code 52 defines measuring tools.

FSC code 51 hand tools include:

- hand tools, edged, non-powered such as chisels and files
- hand tools, non-edged, non-powered such as hammers, pliers and screwdrivers
- hand tools, power driven such as drills, riveters and electric saws
- drill bits, counterbores and countersinks
- taps dies and collets

- tool and hardware boxes
- sets, kits, and outfits of hand tools

FSC code 52 measuring tools include:

- measuring tools, craftsmen's such as calipers, micrometers, gages and plum bobs
- inspection gauges and precision layout tools
- sets, kits, and outfits of measuring tools

E. BERRY AMENDMENT IMPACTS

This section discusses impacts to tool intensive programs.

1. Army

Product Manager Sets Kits Outfits and Tools. All of PM SKOT's sets and kits contain hand and measuring tools. Some sets contain thousands of tools. If one of these tool sets or individual tools is not produced in the United States it can delay the entire acquisition process by several months or force the fielding of incomplete sets without all the required tools. Although each acquisition is different, Berry Amendment issues delay contract award and fielding by three to four months and in extreme cases over a year. This is a result of the additional time and cost required from the program office and support engineer group for additional market research attempting to find domestic sources and/or, alternative tools, analyzing Berry Amendment exceptions for applicability to a particular acquisition or developing a DNAD waiver. Supporting contracting offices are also requiring additional time because of the time and effort required to consider unique procurement requirements for the application of the Berry Amendment, implementing additional Berry Amendment clauses into contracts and additional negotiations required to ensure contractor understanding of Berry Amendment requirements. Berry amendment restriction always impact cost and schedule because of the additional requirements imposed by the Berry Amendment.

The contracting office requires additional time for follow on evaluation of proposed tools by offerers and finally evaluation of statements certifying Berry

Compliance from offerers. Contracting offices also have to take additional time to verify and certify the market research conducted by the program office. The contracting office also feels that in the tool market superior tools are often made in foreign countries so the quality of tools is negatively impacted by being forced to procure tools domestically.

Product Manager Aviation Ground Support Equipment (PM AGSE) manages the tool sets necessary to support Army aircraft before and after flight. They manage the aviation individual, intermediate and shop set tool kits all of which contain numerous hand and measuring tools. Berry Amendment restrictions typically add an additional four months to their contracting process. That time is devoted to market research and additional contracting efforts required to ensure Berry Amendment restrictions are being adhered to. The additional efforts have included issuing of Requests for Information (RFIs) looking for domestic source hand and measuring tools. Both times PM AGSE issued RFIs in response to Berry Amendment restrictions they have received no response. Their experience has shown that dealing with Berry Amendment restrictions cost them a minimum of four months on every tool set and kit contract as well as any reset/modernization effort on existing kits and sets. Berry Amendment restrictions have compelled them to field incomplete systems without the tools they were unable to find domestic sources for. The commander has the option to purchase individual tools to complete the kit but this unfairly puts the burden on the gaining unit to complete the tool sets and achieve full capability. Another variation of the previous method is coding the non-Berry compliant tools so they are not part of the initial issue but commanders are given the discretion to purchase the tools to fill out the tool kits. This again places the burden on achieving full capability on the gaining unit command.

2. Marine Corps

General Purpose Tools & Test Systems Team, Product Manager Test Measurement Diagnostic Equipment (PM TMDE), PM Combat Support Systems, Marine Corps Systems Command manages, procures and fields the Common tool sets for the Marine Corps ground forces. PM TMDE are also experiencing the same contracting problems encountered by the Army with typical delays being three to four months of

additional time required to account for Berry Amendment restrictions. They have also broken kits into separate and distinct pieces to stay under the simplified acquisition threshold. They are also using a similar process as PM AGSE that fields incomplete kits and puts the burden on the commander to complete the kits and achieve the full capability required.

3. General Services Administration

The General Services Administration is designated as the agency assigned integrated wholesale materiel management responsibility by the Department of Defense for all consumable hand tools and craftsmen measuring tools. Those responsibilities include procurement of assigned FSC codes 51 and elements of 52 (Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, 2010). Berry Amendment restrictions have only recently been emphasized by GSA. The old process was that since they service other customers besides the DOD, Berry Amendment restrictions did not apply to them. GSA has now been directed to adhere to Berry Amendment restrictions for DOD procurements. GSA is currently assessing Berry Amendment restrictions on a case-by-case basis for DOD procurements. Initial impacts to their contracting processes include, at a minimum, two months for additional market research and effort to ensure appropriate DFARS Berry clauses are added to DOD contracts. There is also an initial impression from GSA that Berry Amendment restrictions will drive up the cost of hand and measuring tools they procure since the domestic production capability for certain hand and measuring tools is very limited. Tool production is a global market with many hand and measuring tools produced overseas. In other procurements where companies developed domestic sources for items solely to comply with the Buy American Act the price has historically increased. They are also concerned about the quality of tools if there is limited or only one domestic producer of a particular tool.

Additional time and money must be incorporated in all schedule and budget projections if the system includes FSC code 51 or 52 hand and measuring tools.

No information was collected from the Navy or Air Force because there is no central manager for tool sets like there is in the Marine Corps and Army aviation and ground forces.

IV. MEETING USER REQUIREMENTS WHILE COMPLYING WITH BERRY AMENDMENT RESTRICTIONS

A. OVERVIEW

This chapter will examine options for program managers to meet user requirements while complying with the restrictions imposed by the Berry Amendment. Materiel developer influence over the commercial tool marketplace and the capability developer during the requirements definition process will be discussed. Finally, this chapter will examine the viability to program managers of individual Berry Amendment exceptions and how other services and agencies are dealing with the Berry Amendment.

B. COMMERCIAL MARKETPLACE

Since most hand and measuring tools are procured as commercial off the shelf components it useful to examine the commercial marketplace and their government customers. Two examples from leading tool manufacturers are presented below.

Stanley Black and Decker is a Fortune 500 American Company that is an industry leader in hand and power tools. In 2013 Stanley Black and Decker had \$1.5 billion in revenues in their Industrial & Automotive Repair Division, which includes hand and measuring tools, with only 2% of revenue coming from government sales (Stanley Black & Decker, 2014). Government sales are not divided by agency but only a portion of total government sales revenue of 2% can be attributed to the DOD.

SnapOn, one of the leading tool manufacturers stated in its 2013 annual report that, “Although the majority of our revenues in 2013 was from customers other than government entities, each of our segments has agreements relating to the sale of products to government entities. They further stated that neither SnapOn nor any of its segments depend on any single customer, small group of customers or government for more than 10% of its revenues” (SnapOn, 2013). This shows that less than 10% of revenues come from government customers and even less of that is from DOD customers.

Commercial demand for hand and measuring tools far outweigh the demands of the DOD. The DOD demand for certain hand and measuring tools is insufficient to

incentivize manufacturers to produce or assemble the tools in the United States. Generally, less than five percent of industrial sales of hand and measuring tools are attributed to DOD procurement. This situation makes hand and measuring tools different than other DOD procurements where the DOD is driving the market and can exert greater influence over prime contractors. While conducting market research and during discussions with tool manufactures during conventions and trade shows procurement personnel have been told that the DOD market is approximately half a percent of one percent so it is not effective from a business standpoint to have lines of tools made only in the United States. The bottom line is the DOD does not have enough influence to incentivize a tool manufacturer to move tools produced in a foreign country to the United States.

C. REQUIREMENTS DEVELOPMENT

During discussions about the requirements development process with Army and Marine Corps capability and materiel developers it is clear that Berry Amendment restrictions are not considered when developing tool load requirements. The established process is for capability developers to define the pure requirement and for the materiel developer to determine how to deliver the requirement, regardless of Berry Amendment restrictions.

The capability developer does become engaged again when schedule and performance compromises and trade-offs must be made because required tools are not domestically available. For example, the requirement is a screwdriver with an eight-inch handle that is not domestically available but the capability developer would accept a screwdriver with a six-inch handle that is domestically available. The capability developer could also remove the requirement for tools not domestically available in the interest of getting the tool set to the field quicker.

D. FAR EXCEPTIONS

This section discusses exceptions to the Berry Amendment and if they can be practically applied by program managers to deliver capability while complying with the Berry Amendment.

There is a DFARS Berry Amendment exception for acquisitions at or below the simplified acquisition threshold of \$150,000. Although a viable option for purchasing individual tools or sets this is not a viable option for organizations that manage large numbers of or large tool sets and kits. Normally, use of this exception to purchase kits would require splitting of the total purchase to remain under the simplified acquisition threshold. Although this has been considered and used as mitigation to Berry Amendment restrictions the FAR prohibits breaking down the requirement in this way solely for the purpose of coming in under the simplified acquisition threshold.

Another Berry Amendment exception is acquisitions outside the United States in support of combat operations. Combat operations are defined as a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations or hostilities against an enemy of the United States or against an opposing military force; or results in the call or order to, or retention on, active duty members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305 or 12406 of 10 United States code or any other provision of law during a war or during a national emergency declared by the President or Congress (Department of Defense, n.d.). Although this exception may be periodically available it is not normally available to DOD program manager because most acquisitions are performed in the United States.

A third exception is procurements in support of Contingency operations or in conjunction with a Justification and Approval of other than competitive procedures on the basis of unusual and compelling urgency in accordance with FAR 6.302-2. Although this exception may be periodically available it is hard to show that tool kits are directly supporting or being fielded only to units involved in contingency operations. Contracting Officers will normally require a program manager to sign a statement declaring that every kit purchased on a contract is being used to support combat operations making this an exception extremely difficult to use. Even if this exception initially applies if the contingency ends before the contract and deliveries are complete Berry Amendment restrictions will come back into effect. For part two of this exception the FAR restricts the exception to only the time required to meet the unusual or compelling urgency and

not more than one year unless exceptional circumstances apply. Given the conditions this is not an ideal exception for DOD contracts, which are normally spread out over several years. This exception might be able to be used on a very limited basis but most DOD acquisition of tool kits are not required at once or due to a unusual or compelling urgency such as fire, flood, explosion or other disaster. Although this exception may be periodically available if is hard to show that tool kits are directly supporting or being fielded only to units involved in contingency operations. Contracting Officers will normally require a program manager to sign a statement declaring that every kit purchased on a contract is being used to support combat operations making this an exception extremely difficult to use. Even if this exception initially applies if the contingency ends before the contract and deliveries are complete Berry Amendment restrictions will come back into effect.

The final exception is the Domestic Non-availability Determination. This exception is the one that can be used in most circumstances and can be developed to cover a time span up to ten years.

1. DNAD

The DNAD exception is appropriate when the Secretary of Defense or the Secretary of the military department concerned determines that satisfactory quality and sufficient quantity of any such article or item as described cannot be procured as and when needed at United States market prices. This waiver is not delegable below the secretariat level and the waiver is to include an analysis of alternatives and a certification as to why such alternatives are acceptable. Included in this waiver must be an analysis of alternatives that would not require a DNAD and a written certification by the requiring activity, why such alternatives are unacceptable.

10 U.S.C. does not does not provide explicit criteria to be used or requirements to be met to support and document a DNAD waiver. Specific DNAD requirements for DOD procurements are described in DFARS subpart 225.7002-2 and are included below.

Documentation of the market research and results. Market research should include review of manufacturers' information thru various means to include e-commerce

websites, manufacturers' websites, telephone and email inquiries, past procurements, catalogs, marketing literature, industry associations and visits to trade shows and manufacturing sites. The contracting process also requires the release of a Request For Information to FedBizOps attempting to locate domestic sources for tools your market research determined were not available domestically.

An analysis of alternatives that would not require a DNAD and written confirmation by the requiring activity, which specifically states why such alternatives are unacceptable.

This discussion should include why other exceptions are not viable for a particular procurement and explanation of the market research conducted showing that items are not domestically available.

An annual market research review of excepted items. If items originally determined to be non-available domestically become available they must be procured from domestic sources.

An exemption time limit including:

- If DOD plans to take action to maintain, create or expand domestic capability the exception should be for a limited duration.
- If it is anticipated that item will be available in the future the exception should be limited to the intervening period.
- If DOD is planning on taking no action the limitation may be unlimited.

A corrective action plan for obtaining compliant items and your schedule for obtaining same.

Expected outcome if the DNAD is not approved. For tool sets and kits this would normally be fielding of incomplete tool sets without all the required tools and military members not being able to accomplish their mission.

Potential political ramifications, if any. Congressional interest or small business concerns.

If the Secretary of Defense or of the military department concerned applies an exception the Secretary shall, not later than seven days after award of the contract, post a notification that an exception has been applied on the Internet site maintained by the GSA known as FedBizOps.gov.

An additional Army requirement for Hand and measuring tool exceptions is that the DNAD request shall include information on whether items in question are managed by the Defense Logistics Agency (DLA) and written confirmation from the DLA that said items are not available from the DLA in the time needed to meet Army requirements (Department of the Army, n.d.).

2. Reciprocal use of DNADs

Reciprocal use of DNADs is allowed if the same rational applies and similar circumstances are involved and:

- Whether the duration is unlimited or unlimited, you must determine if the existing DNAD will be useful given the schedule constraints.
- Determine if application outside the approving military department is appropriate.
- You should also contact the approving department or Service for any updates or current guidance.

Even after a DNAD waiver is granted there are several things that must be done on a continual basis.

Continuous market research, to include contacting the Department of Commerce, to determine if any of the excepted tools become Berry compliant.

Assessing alternatives such as obtaining technical data rights to manufacture compliant parts, determining cost or effort for bringing contractors into compliance and determining if tools are already exempt under other regulatory exceptions (Defense Procurement and Acquisition Policy, 2014).

Assess on a periodic basis whether changes have occurred in the hand and measuring tool supplier base that would provide opportunities to procure domestically produced hand and measuring tools.

E. BERRY AMENDMENT PROCESSES

PM SKOT has determined the only non-controversial and long-term solution to address Berry Amendment restrictions are thru the use of a DNAD waiver. Although there is a heavy upfront investment in manpower required to conduct the market research and additional time required to staff the waiver to the service secretary this is the only reliable method to support long term contracts normally in place for DOD procurements.

PM AGSE has not developed a viable way to address Berry Amendment restrictions while still delivering full capability. Berry Amendment restrictions have forced them to field incomplete systems unfairly putting the burden on the gaining units to complete the tool sets or issuing tool sets with open slots with the expectation that they will be filled with older tools from the tool sets being replaced. This forces units to rely on old, unsupported out of date tools.

The Marine Corps have also not developed any viable options and are also using processes that field incomplete kits and put the burden on the commander to complete the kits. They are also separately purchasing individual tools to stay under the simplified acquisition threshold and providing those tools to units to fill out the kits.

The GSA is still determining how they will support DOD tool procurements given the recent emphasis on adhering to Berry Amendment restrictions in their contracting processes.

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V. CONCLUSIONS AND RECOMMENDATIONS

A. HISTORY OF THE BERRY AMENDMENT

Domestic restrictions on Department of Defense procurements have been in effect for over 70 years and were included in every Defense appropriation Act until 1992 when the restrictions became a note to United States Code 2241. The Berry Amendment restrictions were made permanent in 1994 by section 8005 of Pub. L. 103-139.

Acquisition professionals must understand the Berry Amendment because it is here to stay. Over the years there have been attempts to reduce the scope of the Berry Amendment but over time the Berry Amendment has only been strengthened. There is no indication that anytime in the near future Congress will relax or eliminate the domestic source restrictions imposed by the Berry Amendment.

B. BERRY AMENDMENT CONSTRAINTS ON TOOL INTENSIVE PROGRAMS

10 U.S.C. § 2533a states that except as provided in subsections (c) and (b) funds appropriated or otherwise available to the Department of Defense may not be used for the procurement of an item described in subsection (b) if the item is not grown, reprocessed, reused, or produced in the United States. Hand and measuring tools are items specifically called out in subsection (b).

The Berry Amendment is implemented through the Defense Federal Acquisition Regulation supplemented by the Federal Acquisition Regulation. Exceptions to Berry Amendment restrictions are listed in DFAR 225.7002-2 and include purchases below the simplified acquisition threshold, purchases in support of combat operations or unusual and compelling urgency and Service Secretary determination that tools are not available in sufficient quality or quantity that are produced in the United States.

C. BERRY AMENDMENT IMPACTS ON TOOL INTENSIVE PROGRAMS

For tool intensive sets and kits additional time and budget must be added to your program plan to account for additional time and work effort required to address hand and

measuring tool Berry Amendment restrictions. Program Management Offices must determine if required tools are available domestically, if they are not they must find a new domestic source, find a suitable replacement or alternative and finally apply one of the exceptions if no domestic source can be found. This effort will take time and require a significant investment in labor. Estimates on additional time required to address Berry Amendment restrictions vary from two months to a year. In all case additional time was required. This is in addition to the additional time required by the contracting agencies to account for Berry Amendment restrictions during the pre-award, award and post award contract phases. Estimates on from procurement personnel on additional contracting time vary from two to six months.

There are also concerns that domestic restrictions could impact the quality of tools procured and/or increase the cost to the government. Additional impacts range from fielding incomplete tools sets, putting the burden on the receiving unit to acquire tools to fill out the tool sets or reusing old antiquated tools from replaced tools sets. None of these options are suitable ways to address Berry Amendment restrictions.

The government cannot accept non-compliant items and the contractor cannot be paid for any items that are in violation of the Berry Amendment. Failure to comply with Berry Amendment provisions subject a contractor to legal risk to include contract default, compliance actions up to and including suspension or debarment and civil and criminal penalties (Corrigan & Stafford, 2007). If you suspect one of your contractors may be in violation of the Berry Amendment the following steps must be taken:

- Notify legal counsel immediately.
- Verify the item is subject to Berry restrictions.
- Suspend government acceptance of non-compliant items.
- Ensure DFAS suspends payments on non-compliant supplies pending resolution.

D. COMPLIANCE WITH THE BERRY AMENDMENT

Most DOD hand and measuring tools are bought as commercial off the shelf items. This presents an issue for managers of tool intensive sets and kits because of the small market share provided by DOD customers there is little incentive for major tool manufacturers to provide domestic sources for their tools. This situation makes hand and measuring tools different than other DOD procurements where the DOD is driving the market and can exert greater influence over prime contractors.

Capability developers in the Army and Marine Corps do not consider Berry Amendment restrictions when developing tool load requirements putting the burden on the materiel developer to fill those requirements in spite of Berry restrictions.

A Domestic Non-availability Determination is the most viable, non-controversial option to acquire hand and measuring tools restricted by the Berry Amendment. Other exceptions available for hand and measuring tools are only available for a limited amount of time or are too cost restrictive to support most DOD set and kit procurements.

A heavy upfront investment is required to conduct the market research and provide the required information to support a DNAD it is the only option that gives you complete authority to procure tools from non-domestic sources. A DNAD will also support long term contracts and requirements because you can set a lengthy time limit or set no time limit at all. There is also a continuing investment in time even after the DNAD is approved. Market research must be continuously conducted to ensure excepted tools do not become domestically available. In addition to the time required above additional time must be factored in for the staffing process. All DNADs must be approved by the Secretary of Defense or the secretary of the military department concerned. Normal staffing time to gain approval is estimated to be 12 months.

E. CONCLUSION

To be successful materiel developers who manage hand and measuring tool intensive programs must understand Berry Amendment restrictions, exceptions and their impacts on cost, schedule and technical aspects of their programs. Failure to account for the restrictions imposed by the Berry Amendment and the additional steps required to

ensure you are in compliance with the Berry Amendment could lead to schedule delays and/or delivery of systems that do not totally meet the requirements as defined by the capability developer. Violations of the Berry Amendment may also be considered a violation of the Anti-Deficiency Act for which you could be held personally liable. Although there are several exceptions to the Berry amendment available most can only be applied on a very limited basis. The only exception that applies in all situations, allows you to field full sets or kits that meet capability developer requirements and can be used to meet long term requirements is the approval of a DNAD by your Service Secretary. The materiel developer must understand the specific requirements identified in the DFARS that must be included in the document and staffing time required for approval. Those elements must then be factored into any budget and schedule estimates. There are no quick or easy methods for dealing with the Berry Amendment but there is an exception that if properly applied will allow the hand and measuring tool materiel developer to be successful and deliver complete systems that meet capability developer requirements in a timely, cost effective manner.

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